Case No.: 79839-7

SUPREME COURT OF THE STATE OF WASHINGTON

American Legion Post #149
Appellant
vs.
Washington State Department of Health
and
Kitsap County Health District
Respondents

REPLY BRIEF OF APPELLANT

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1. The law prohibits smoking in designated "public places" that are also "places of employment." Respondents concede that the Post Home is a "private facility," not a "public place." The law expressly exempts "private facilities" from "this chapter."

The Respondents concede that the Post Home is a "private facility." CP 99 [Admission by Bonnie Latham, KCHD Food Program Manager]; KCHD Response at 2. The plain language of the statute exempts "private facilities" from "this chapter ... except upon the occasions when the facility is open to the public." RCW 70.160.020(2). Consequently, there is no need to "graft" language from the definition of "public place" onto the definition of "place of employment" as DOH argues. DOH Response at 6.

The Respondents concede that I-901 set out and repeated the "private facilities" exemption without change. See Opening Br. at 10.

> Any section of the Revised Code of Washington ... expressly amended by the legislature, including the entire context set out, shall, as so amended, constitute the law and the ultimate declaration of legislative intent.

RCW 1.04.020.

The Ballot Measure Summary, quoted at page 10 of DOH's Response, makes no mention about repealing the exemption for "private facilities" that are "places of employment." Consequently, the fact that I-901 added "places of employment" to Chapter 70.160 is irrelevant since the law does not apply to "private facilities" such as the Post Home.

The Respondents cite the ballot title to I-901 which states that:

> This measure would prohibit smoking in buildings and vehicles open to the public and places of employment, including areas within 25 feet of doorways and ventilation openings unless a lesser distance is approved.

(emphasis added). DOH Response at 9; See also RCW 70.160.011. According the Black's Law Dictionary, the word "and" is

> [A] conjunctive connecting words or phrases expressing the idea that the latter is to be added to or joined with the first. ... It expresses a general relation or connection, a participation or accompaniment in sequence, having no inherent meaning standing alone but deriving force from what comes before and after.

Although the Respondents admit that the Post Home is not a "public place," they interpret the law to ban smoking at either public places or

places of employment. Under the Respondents' interpretation of the law as applying to either "public places" or "places of employment," there could be no smoking within 25 feet of any "public place" independent of whether or not they are "places of employment."

This interpretation is not only contrary to the plain meaning of the word "and" but inconsistent with their application of the law as to 25% of hotel/motel rooms. It is also inconsistent with DOH's argument that:

> [T]o the extent a private enclosed workplace is not anyone's place of employment ... smoking could still occur in such an area without regard to whether the building around the space is a 'public place' as defined by RCW 70.160.

DOH Response at 13-14.

2. The "private workplace" exemption is consistent with the "private facility" exemption and the title of the Act "Smoking in Public Places." Nevertheless, the Respondents argue that the exemption for "private workplaces" does not apply to "private facilities" and, in any case, the exemption is trumped by the definition of "place of employment."

The law uses the terms "workplaces" and "places of employment" interchangeably. The intent section states:

> In order to protect the health and welfare of all citizens, including workers in their *places of employment*, it is necessary to prohibit smoking in public places and *workplaces*.

RCW 70.160.011 (emphasis added).

Under RCW 70.160.060, smoking is allowed "in a private enclosed workplace, within a public place." However, because the Respondents read the "private facilities" exemption to apply only to the definition of "public place" rather than "this chapter," they reject the Post's argument that it should be given the same privilege as "public places" under RCW 70.160.060. KCHD Response at 7 and 9.

Unlike "public places" which are allowed to have smoking in "private enclosed workplaces" under RCW 70.160.060, KCHD never gave the Post "any alternatives other than a complete ban on smoking." CP 106 [Kucenski Declaration]. KCHD assumed the entire Post Home falls within the definition of a "place of employment" and demanded that smoking be banned at the entire facility. RCW 70.160.020(3); CP 22-23. This assumption is factually and legally erroneous.

Even if the "private workplace" exemption applied, DOH argues that the new definition of "place of employment" makes RCW 70.160.060 meaningless. DOH Response at 13.

This Court has repeatedly stated, "In interpreting an initiative we must look to the voters' intent and the language of the initiative as the average informed lay voter would read it." In re Estate of Hitchman, 100 Wn.2d 464, 467, 670 P2d 655 (1983); State ex rel. PDC v. WEA, 156 Wn.2d 543, 554 (2006). Given the law uses the word "workplace" and "places of employment" interchangeably and the trial judge's difficulty with that distinction ("So, how do you have a private workplace without employees?"), an average informed lay voter would equate "workplace" with "place of employment". RCW 70.160.011; Opening Br. at 24 [RP 40:14-23]; CP 322 [Deditius Declaration]. DOH uses the words interchangeably when it argues that:

> [T]he Court should avoid a construction that would render the prohibition on smoking in a privately owned *workplace* meaningless.

DOH Response at 14 (emphasis added).

Would an informed lay voter, say a veteran, looking at the expanded definition of "public place" under I-901 to see if his veteran organization's private facility is covered, understand that the list is irrelevant given the definition of "place of employment"? Why would I-901 add to the list of public places "bars, taverns, bowling alleys, skating rinks, casinos," if they already fell within the definition of "place of employment"? Given the fact that veteran organization private facilities were exempt before I-901, the failure to repeal the "private facilities" exemption and the failure to expressly list such facilities in the amended language bars including them by implication. *Expressio unius est exclusion alterius* – specific inclusions exclude implication. Washington Natural Gas Co. v. PUD 1, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). By contrast, Massachusetts law separately identifies "membership associations" to include veterans' organizations and specifically defines when smoking is prohibited in

such facilities. Mass. Gen. Laws Ann. Ch. 270, sec. 22(a) and (c)(2)(i).

If the purpose of the definition of "place of employment" was intended to trump the "private facilities" exemption, that should have been made clear in the language of the exemption. Rather than saying that "This chapter is not intended to restrict smoking in private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public," the language should have said "this definition" and/or qualified the exemption by adding that it does not apply when they are "places of employment." RCW 70.160.020(2).

Compare how the law deals with the exemption for private residences. The definition of "public place does not include a private residence." RCW 70.160.020(2). The definition of "place of employment" goes on to clarify that:

> A private residence or home-based business, unless used to provide licensed child care, foster care, adult care, or other similar social service care on the premises, is not a place of employment.

RCW 70.160.020(3).

Although the law lists what is a "public place," it fails to list 25% of hotel/motel rooms as exempt from the definition of "place of employment" or expressly include them as "private facilities." Respondents assume the definition of "place of employment" excludes 25% of hotel rooms but includes all other "private facilities."

Finally, the Respondents' fear that "every privately owned 'place of employment' would become a 'private workplace,' where smoking is allowed," is exaggerated given the unique facts of this case and the definition of "public place." DOH Response at 14; KCHD Response 9. As a "private facility" open only to member-owners with key cards, the Post Home is a "private enclosed workplace." CP 102-104 [Kucenski Declaration].

3. The Respondents admit the Hotel/Motel Room exception to "public place" is not found in the definition of "place of employment." However, they ask the court to infer the exemption also applies to "place of employment" as if those hotel/motel rooms were "private facilities" exempt from "this chapter." The Post Home is a "private facility" and should be exempt from "this chapter" as well.

Although the definition of "public place" was amended by I-901 to include "no less than seventy-five percent of the sleeping quarters within a hotel or motel that are rented to guests," the definition of "place of employment" makes no mention of "hotel or motel" rooms. DOH admits "There is no corollary exemption for a place of employment" regarding hotel/motel rooms. DOH Response at 15.

Nevertheless, the Respondents treat the 25% hotel exemption as if it is from "this chapter" rather than only from the definition of "public place." In other words, by defining "public place" to include up to 75% of hotel rooms, the law left 25% as exempt "private facilities." Since "public place" was not amended by I-901 to include veteran organization private facilities, those facilities should continue to be exempt from the "chapter" as "private facilities" just as 25% of hotel rooms.

> The provisions of a statute, so far as they are substantially the same as those of a statute existing at the

> time of their enactment, must be construed as continuations thereof.

RCW 1.12.020.

To interpret the law otherwise would be arbitrary and contrary to the letter of the law. Even the Respondents' admit that "[O]nly private residences and home based businesses are exempt." DOH Response at 23. Contrary to the Respondents' claim that "the Post is asking the court to rewrite the law to achieve its preferred policy," it is the Respondents who graft onto the definition of "place of employment" language exempting 25% of hotel rooms even though "employees are required to pass through during the course of employment." DOH Response at 16; KCHD Response at 10; RCW 70.160.020(3). This construction is at odds with the express language of the "private facilities" exemption from "this chapter" and respondents' application of that exemption to only the definition of "public place."

4. The Post has standing as a member-owned organization.

KCHD argues that the Post lacks standing to represent its members. KCHD Response at 12. However, the decision they rely on held that the organization had standing. In NYC CLASH v. City of New York, 315 F.Supp.2d 461 (S.D.N.Y. 2004) the court held "that participation of individual CLASH members is not required." Id., at 469. The court cited NAACP v. Button, 371 U.S. 415 (1963) for the proposition that "There is, however, no absolute requirement that individual members be identified in order to confer organizational standing."

The Post "is a nonprofit, private corporation wholly owned by its membership" which

> [I]s limited to those individuals who have served in the United States Military or Merchant Marine during specific time periods designated by Congress. They must have received an honorable discharge or be still on active duty.

CP 102-103 [Kucenski Declaration]. The Post does not exist without qualified members who are the "owners." See RCW 70.160.050.

The interests the Post seeks to protect are germane to the organization's purpose, traditions and expectations. CP 102-106 [Kucenski Declaration]; CP 349-356 [Jackson Declaration]. As stated in Mr. Kucenski's declaration at paragraphs 8 and 9:

> The Post Home is the social center for many of our retired veterans and their families. The loss of their ability to smoke in the Post Home will impinge on their existing privacy, associations and social relationships at the Post causing them irreparable harm and is likely to result in a loss of membership.
>
> The smoking ban is contrary to the traditions and expectations of the Post and its members who expect they will be allowed to associate, drink and smoke. This expectation dates from the founding of the Post, construction of the facility (including the bar) and has been reiterated by the membership.

CP 104

5. The Respondents' arbitrary application of the law to prohibit smoking anywhere at the member-owned Post Home impinges of fundamental rights.

The Post is not claiming there is a fundamental right to smoke any more than cases about abortion, contraception and sodomy claim those activities are fundamental rights

independent of due process, equal protection, privileges and immunities, privacy and liberty. This case is about whom decides the use of a veteran's organization's private facility when the law arbitrarily impinges on fundamental rights of its members-owners.

DOH argues that "The Post has not formulated any plausible argument that the legislation violates the Washington or United States Constitution." DOH Response at 18. The arguments are set forth in the Open Brief and supported by caselaw and declarations. Opening Br. at 20-35; CP 102 [Kucenski Declaration]; CP 318 [Deditius Declaration]; CP 349 [Jackson Declaration]. Cases cited by the Respondents upholding the validity of smoking bans that prohibit smoking in certain locations while allowing it in others are distinguishable. KCHD Response 31-32. For example, in this case the Respondents create classifications that are not found in the letter of the law. They create a privilege not found in the law by exempting 25% of hotel rooms from the "this chapter."

The Post specifically cites the Respondents' arbitrary interpretation and application of the exception for 25% hotel/motel rooms from the definition of "public place." This contrasts with the Respondents' interpretation and application of the exemption for other "private facilities" such as the Post Home. Opening Br. at 25, 27, 30, 33. DOH essentially asks the court to ignore that conundrum while KCHD argues that "the spirit or intent of a law prevails over the letter of the law." DOH Response at 16, 24 (fn. 3); KCHD Response at 4.

Yet, Respondents argue that the definition of "place of employment" is not unconstitutionally vague but "clear and succinct." DOH Response at 21-22. If that were true, there would be no need to graft onto the "two narrow exceptions to the prohibition on smoking in a place of employment" language (i.e. "A private residence or home based business") an exemption for 25% of hotel rooms. Id., at 16, 23. What is "clear and succinct" is the exemption from "this chapter" for "private facilities which are occasionally open to the

public except upon the occasions when the facility is open to the public." RCW 70.160.020(2).

6. Conclusion: This case comes down to one of statutory interpretation and application.

The letter of the law exempts "private facilities which are occasionally open to the public except upon the occasions when the facility is open to the public" and "private enclosed workplaces within a public place." RCW 70.160.020(2); RCW 70.160.060. Respondents disregard this language. They ignore the fact that private facilities operated by veteran organizations were exempt before the adoption of I-901. I-901 did not change that exemption. It did not expressly add to the definition of "public place" such veteran organization facilities. For example, I-901 amended the definition of "public place" to include 75% of hotels and motel rooms thereby keeping 25% exempt as "private facilities." I-901 could have specifically identified membership associations and their private facilities but did not.

While the Respondents argue that smoking is prohibited if a facility is either a "public place" or a "place of employment," I-901 used the word "and" meaning that both conditions must apply. RCW 70.160.011. This is consistent with how the Respondents have interpreted the 25% hotel/motel exemption and should be how the Court interprets the exemption for other "private facilities" such as the Post Home.

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